NO. 56944-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Detention of

DERWIN LERON PASLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by finding "In February 2020, [K.R.] accused Mr. Pasley of sexually assaulting him." Finding 14; CP 395.

2. The trial court erred by finding "that Mr. Pasley's assault of [K.R.] constitutes a recent overt act." Finding 43; CP 400.

3. The trial court erred by finding "that the . . . evidence proves beyond a reasonable doubt that Mr. Pasley's assault of [K.R.] created a reasonable apprehension of harm of a sexually violent nature in the mind of an objective person who knows of Mr. Pasley's history and mental condition." Finding 44; CP 400-01.

4. The trial court erred by finding that "Mr. Pasley had knowledge of some intellectual impairment of [K.R.]'s, although not specified." Finding 45; CP 401.

5. The trial court erred by concluding, "The State has proved beyond a reasonable doubt that Mr. Pasley is a sexually

violent predator under RCW 71.09.020(19). Conclusion 3; CP 402.

6. The trial court erred by concluding, "The State has proved beyond a reasonable doubt that Mr. Pasley's mental abnormality and personality disorder in combination cause Mr. Pasley serious difficulty in controlling his sexually violent behavior." Conclusion 7; CP 402.

7. The trial court erred by concluding, "The State has proved beyond a reasonable doubt that Mr. Pasley's mental abnormality and personality disorder in combination make him likely to engage in predatory acts of sexual violence if not confined in a secure facility." Conclusion 8; CP 402.

8. The trial court erred by concluding "The State has proved beyond a reasonable doubt that Mr. Pasley committed a recent over act under RCW 71.09.020(13) in his assault of [K.R.] Conclusion 9.

9. The trial court erred by excluding an excerpt of Mr. Pasley's deposition in which he recounted K.R.'s statement that

what was "up" between Mr. Pasley and K.R. was "cool," even though K.R. had a girlfriend.

10. Defense counsel was ineffective for failing to re-raise the exclusion of the disputed deposition excerpt.

a. There was no strategic reason to acquiesce in the ruling excluding the deposition excerpt, which contained crucial evidence relating to Mr. Pasley's perception of the encounter.

b. Had defense counsel re-raised the issue, the trial court would likely have admitted the excerpt, since the Evidence Rules required it.

Issues Pertaining to Assignments of Error

1. Where the State submitted only Mr. Pasley's deposition, describing a consensual sexual encounter with an 18-year-old man, a judgment and sentence and plea statement indicating that Mr. Pasley entered an In re Barr plea to third-degree assault – negligence based on this encounter, and a detective's testimony that the 18-year-old man looked younger

than his actual age, was the evidence sufficient to prove Mr. Pasley's encounter with this man created a reasonable apprehension of harm of a sexually violent nature? (No. The evidence was therefore insufficient to sustain a finding that Mr. Pasley committed a recent overt act.)

2. Must the trial court's order granting the State's petition for Mr. Pasley's civil commitment under the sexually violent predator statute, chapter 71.09 RCW, be reversed where the trial court erroneously excluded evidence that the "victim" of Mr. Pasley's alleged recent overt act gave affirmative consent for their sexual contact? (Yes, there is a substantial likelihood that the erroneous exclusion of that evidence affected the verdict.)

3. Must the trial court's order granting the State's petition for Mr. Pasley's civil commitment under the sexually violent predator statute, chapter 71.09 RCW, be reversed where trial counsel failed, for no strategic reason, to secure the admission of evidence that the "victim" of Mr. Pasley's alleged recent over act gave affirmative consent for their sexual contact?

(Yes, there is a substantial likelihood that, but for counsel's error, the outcome of trial would have been different.)

B. STATEMENT OF THE CASE

Derwin Pasley was born and raised in Miami, Florida, in a deeply religious family. Ex. 29 at 7, 10-11. When he was 20 years old, Mr. Pasley joined the military, and was transferred to California, then South Carolina, and eventually to Washington State. Ex. 29 at 7-9. There, Mr. Pasley completed his active duty, got married, and received his bachelor's degree in general ministries, planning to become a church administrator. Ex. 29 at 9-10, 80. He ultimately gave up on that aspiration, however, because he committed several offenses that he later described as thoughtless, selfish, and "violat[ing] a number of moral and ethical obligations." Ex. 29 at 11, 57-59.

By 2001, Mr. Pasley was working or volunteering in various positions involving youth: as a middle school football coach; a choir director, worship leader, and janitor at an Olympia area church; and a paraeducator at a local school. Ex. 29 at 40, 43-44,

65-66. At the church, in 2002, Mr. Pasley touched a boy named V.S. inappropriately. Ex. 29 at 52. He said he disguised the touching as wrestling, to "cover[] it up in a playful manner." Ex. 29 at 52, 54-55.

In 2006, a boy named P.D. joined Mr. Pasley's football team and Mr. Pasley became friends with P.D. and his mother. Ex. 29 at 81; RP (April 18, 2022) at 81-82. Mr. Pasley gave P.D. rides to and from football practice, and P.D. occasionally spent the night at Mr. Pasley's home, with Mr. Pasley's wife and two children. Ex. 29 at 82-85; RP (April 18, 2022) at 34-37.

Between 2008 and 2009, Mr. Pasley offended against a 7th grade boy named J.S., touching his penis outside of his clothes and telling J.S. to touch Mr. Pasley's penis. Ex. 29 at 68-76. These offenses occurred when Mr. Pasley was driving J.S. home after football practice. Ex. 29 at 69-71.

In October of 2009, P.D.'s mother asked him whether Mr. Pasley had touched him inappropriately, and he said yes. RP (April 18, 2022) at 44-46. P.D. then told police that Mr. Pasley

had touched his penis on about 20 occasions, over his clothes during car rides, and had also touched him once at Mr. Pasley's house. RP (April 18, 2022) at 38-43. He said Mr. Pasley never acknowledged that the touching was occurring, instead acting as if they were playfully roughhousing or tickling. RP (April 18, 2022) at 40, 50-51. P.D.'s family eventually sued the football league in connection with these allegations, and P.D. was personally awarded about $50,000. RP (April 18, 2022) at 45-47.

Police investigated all these incidents at the same time and, in August of 2010, Mr. Pasley pleaded guilty to three counts of child molestation, for the offenses against V.S. in 2002 and against J.S. and P.D. more recently. Ex. 1 at 1-5. The court imposed an exceptional sentence of 150 months, followed by 36 months of community custody, consistent with the parties' stipulation. Ex. 1 at 3-5.

Mr. Pasley entered sex offender treatment for the first time in 2017, while he was incarcerated. Ex. 29 at 64. He described this experience as transformative:

> [O]ne of the things that we dealt with in treatment is our offending . . . behaviors, and taking responsibility for our actions. And so after going through that process, I had to - - my goal in life is to continue to be truthful to who I am as a person and to who I am, and part of my truth, had to - - I had to take accountability for my actions with [my victims.]

Ex. 29 at 63-64.

When he was released to community custody in 2018, Mr. Pasley began treatment with Sharese Jones, a psychologist specializing in cognitive and dialectical behavioral therapy for sex offenders. RP (April 21, 2002) at 591-94. Ms. Jones treated Mr. Pasley for 17 months and considered him a model client. RP (April 21, 2002) at 595, 598-99. She worked with Mr. Pasley to resolve his feelings of conflict over his sexual orientation, and his impulsiveness, and she considered him to have made significant progress. RP (April 21, 2002) at 600-01, 605-09.

When Mr. Pasley graduated from his required treatment after one year, he continued voluntarily for several more months. RP (April 21, 2002) at 604. During this time, Mr. Pasley experimented with using dating apps, and he sought Ms. Jones's

advice about how to make "a healthy partner choice." RP (April 21, 2002) at 604.

In November of 2020, Mr. Pasley entered In re Barr[1] pleas to two counts of third-degree assault, negligence. Ex. 2 at 1. The court imposed 18 months of confinement, followed by a year of community custody. Ex. 2 at 4-5. These pleas arose from Mr. Pasley's sexual encounter with an 18-year-old named K.R., who was friends with Mr. Pasley's nephew. Ex. 32 at 10; Ex. 29 at 86-87, 91-105. In his plea statement Mr. Pasley agreed that he "did intentionally touch [K.R.] in an offensive manner," but he otherwise steadfastly maintained that their encounter was consensual. Ex. 32 at 10; Ex. 29 at 86-87, 91-105.

Before Mr. Pasley completed his term of confinement, the State filed a petition seeking his civil commitment as a sexually violent predator (SVP). CP 1-2.

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[1] 102 Wn.2d 265, 684 P.2d 712 (1984). In an In re Barr plea, the defendant accepts a conviction for an offense for which there is no factual basis, in exchange for dismissal of greater charges for which a factual basis exists. Id. at 270.

To involuntarily commit a person as an SVP, the State must prove beyond a reasonable doubt that the person:

> has been convicted of or charged with a crime of sexual violence and . . . suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility

RCW 71.09.020(19), .060(1).

In addition to proving these criteria, the State is sometimes required to prove the defendant committed a "recent overt act" (ROA), which is an act that either causes harm of a sexually violent nature or creates a reasonable apprehension of such harm. In re Young, 122 Wn.2d 1, 40-42, 857 P.2d 989 (1993), superseded by statute on other grounds as stated in Det. of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003); RCW 71.09.020(13). In its petition, the State alleged Mr. Pasley's encounter with K.R. constituted an ROA. CP 2.

The court found probable cause and the parties proceeded to trial. CP 141-42. The State presented testimony by three witnesses:

P.D. testified consistent with his allegations in 2009. RP (April 18, 2022) at 32-56.

Detective Howard Reynolds testified that he investigated the incident involving K.R., and that K.R. appeared to him to be similar to a boy of 13 or 14 years old. RP (April 20, 2022) at 296, 319. The detective said this was because K.R. was shy, had braces, and was "very, very thin," by which the detective said he meant 5 foot 7.5 inches and 140 to 150 pounds. RP (April 20, 2022) at 318-19. Det. Reynolds also testified that he determined K.R. should be interviewed by a facility that specializes in interviewing children and people with disabilities. RP (April 20, 2022) at 304.

Detective Reynolds also testified that, when the Attorney General's Office contacted him in December of 2021, for a picture of K.R., he searched K.R.'s Facebook page and selected the youngest-looking photo posted there. RP (April 20, 2022) at 325-32. That photo, and the broader collection from which he selected it, were entered into evidence. RP (April 20, 2022) at 324-32; Ex. 7, 520, 521.

Dr. Fox testified that he had reviewed about 5,000 pages of discovery, interviewed Mr. Pasley and Ms. Jones, listened to an audio recording of K.R.'s statement to police, and performed two actuarial risk assessments on Mr. Pasley. RP (April 18, 2022) at 72-80, 149-50. Based on this data, Dr. Fox diagnosed Mr. Pasley with "other specified paraphilic disorder with specifier of deviant interest in pubescent aged males" and "other specified personality disorder" with antisocial and narcissistic features. RP (April 18, 2022) at 86, 112-139. All Dr. Fox's testimony was subject to the limiting instruction that the materials on which he relied were not admitted as substantive evidence. RP (April 18, 2022) at 94.

Dr. Fox testified that his actuarial analyses assigned Mr. Pasley an "absolute recidivism risk" of 47.4 percent in ten years, and 56 percent in 20 years. RP (April 19, 2022) at 193-96, 272. That number was based in substantial part on Dr. Fox's conclusion that, since Mr. Pasley had committed an offense after completing treatment, he should be scored as if he had never attended any treatment at all. RP (April 19, 2022) at 178-79; see RP (April 21,

2022) at 481-82. It was also based on Dr. Fox's conclusion that, despite the overwhelmingly positive assessment reflected in her treatment notes, Ms. Jones actually believed Mr. Pasley was a manipulator, with antisocial and narcissistic traits, who used treatment to connect with younger men. RP April 19, 2022) at 198-99, 237-53.

Dr. Fox did not offer an opinion as to whether Mr. Pasley's encounter with K.R. constituted an ROA. RP (April 19, 2022) at 202. But he did testify that he perceived "parallels" between that encounter and Mr. Pasley's pre-treatment offenses. RP (April 19, 2022) at 202. He said that, like all the pre-treatment victims, K.R. was shy, softspoken, vulnerable, and had an absent father. RP (April 19, 2022) at 202; see Ex. 29 at 61, 78, 85; RP (April 18, 2022) at 36.

Dr. Fox acknowledged that that the DSM defines "pubescent" as "typically 13 or younger," that Mr. Pasley's adjudicated 2002 and 2009 victims were "pubescent," and that K.R. was presumably "postpubescent," given his age. RP (April

19, 2022) at 208-09. He also testified that he had no knowledge of K.R.'s IQ, had never met K.R., and did not know whether he had any specific diagnosis. RP (April 19, 2022) at 210. However, based on the fact that K.R. had an "individual education plan" (IEP), which qualified him to play on a Special Olympics basketball team, on statements by K.R.'s mother that he had difficulty with reading and writing, and on Detective Reynolds's opinion that K.R. was shy and softspoken, Dr. Fox opined that he was similar to Mr. Pasley's pubescent victims. RP (April 19, 2022) at 118, 202, 210-11.

Finally, Dr. Fox testified that he believed actuarial instruments always underestimate risk, since most sex offenses go undetected. RP (April 19, 2022) at 195. For this reason, and because he believed that past behavior is "one of the strongest predictors" of future behavior, Dr. Fox opined that Mr. Pasley was likely to engage in predatory acts of sexual violence if not confined. RP (April 19, 2022) at 200-01.

During the State's case-in-chief, the court heard portions of Mr. Pasley's recorded deposition, which the parties had jointly redacted. RP (Mar. 18, 2022) at 8-14.

In the deposition, Mr. Pasley admitted the offenses against V.S. and J.S., but denied the offenses against P.D. Ex. 29 at 55, 77, 86. He said he had no idea why P.D. had made allegations against him. Ex. 29 at 86. Mr. Pasley also acknowledged that, one year before he graduated from high school, he was arrested on suspicion of molesting a six-year-old boy at the YMCA after-school program where he worked as a counselor. Ex. 29 at 31-33. Mr. Pasley maintained these accusations were false, but he acknowledged an undetected later offense, against a 14-year-old male victim named "B." Ex. 29 at 33-34, 37-39.

Reflecting on his behavior with V.S., Mr. Pasley said he did not believe he was "attracted" V.S., but that he was instead attracted to the idea of sexual contact with a male. Ex. 29 at 55-57. He described his behavior with V.S. as thoughtless and selfish, and he said he now knew that—no matter what he believed at the

time—there was no way a child could consent to sexual contact with an adult. Ex. 29 at 57-59. He made similar observations about his offenses against J.S. Ex. 29 at 77, 79-80.

Mr. Pasley said he offended against children because he wanted a sexual connection with a male but was afraid an adult "would eventually reveal my actions to my spouse or anyone else that I knew." Ex. 29 at 81.

In contrast to his offenses against J.S. and V.S., Mr. Pasley described his encounter with K.R. as consensual. He said he met K.R. in January of 2020, when he came to Mr. Pasley's home to watch the Super Bowl with Mr. Pasley's nephew. Ex. 29 at 86-87. He said he chatted with K.R. that day, but not about anything sexual. Ex. 29 at 88. At some point, he asked K.R. how old he was, and K.R. said he was about to turn 19. Ex. 29 at 97-98.

K.R. next came to Mr. Pasley's house about two weeks later and spent three nights there. Ex. 29 at 88-89. Mr. Pasley described his nephew as "diagnosed as being mentally retarded," and said

K.R. met his nephew because both played for a Special Olympics basketball team. Ex. 29 at 89.

On the second night of his visit, Mr. Pasley asked K.R., "Did he get down?" Ex. 29 at 91-92. He said this was a way of asking whether a person "has a fluid lifestyle," and that K.R. said he did. Ex. 29 at 91. Mr. Pasley said he had expected this response, based on K.R.'s mannerisms and style of dress. Ex. 29 at 94-95. After that, the two men "touched each other . . . [and] fondled each other's penises." Ex. 29 at 92. Mr. Pasley said this happened early in the morning, before he left for work, and that K.R. was a willing participant in the contact. Ex. 29 at 92, 95-96.

The following night, the two men engaged in sexual contact again, briefly. Ex. 29 at 101-03. Mr. Pasley said he ended that encounter because he was tired, and that soon after he saw K.R. on the phone, appearing distraught and crying. Ex. 29 at 103. Mr. Pasley told him he was "here for you if you need something," but K.R. said he was good, so Mr. Pasley went back to his bedroom. Ex. 29 at 103-04. Sometime later, Mr. Pasley awoke to the home's

alarm sounding. Ex. 29 at 104-05. He went upstairs and found that K.R. had left via the front door. Ex. 29 at 105.

The defense presented testimony by Ms. Jones and Dr. Brian Abbott. RP (April 20, 2022) at 348-438; RP (April 21, 2022) at 447-627.

Ms. Jones acknowledged some concerns, regarding one "impulsive" sexual encounter Mr. Pasley had with an adult male at his gym after completing his required treatment, and about Mr. Pasley's "concentrating more on younger-looking men inside and outside of group." RP (April 21, 2022) at 623-24. And, when deposed, she said she was not sure Mr. Pasley was completely forthcoming with her. RP (April 21, 2022) at 625. But Ms. Jones unequivocally rejected the vast majority of the statements Dr. Fox attributed to her. RP (April 21, 2022) at 612-21.

Ms. Jones testified that she did not believe Mr. Pasley exhibited narcissistic and antisocial traits, nor that he was attempting to "lure" younger men, nor that he had violated the terms of his court-ordered treatment. RP (April 21, 2022) at 612-

21. She opined that Mr. Pasley understood the risks associated with his interest in younger men, even if he had not fully "internalized" that understanding. RP (April 21, 2022) at 624-25. And she gave him a positive evaluation upon his discharge from treatment. RP (April 21, 2022) at 598-612. This evaluation credited Mr. Pasley with providing good feedback to other group members, demonstrating solid compliance with treatment and supervision conditions, reliably disclosing incidental contact with minors and details of his sex life, working to resolve his internal conflict over his sexual orientation, and overall cultivating a strong therapeutic relationship. RP (April 21, 2022) at 598-612.

Consistent with Ms. Jones's testimony, Dr. Abbott opined that Mr. Pasley had made significant progress in treatment. Dr. Abbott also testified that he did not believe Mr. Pasley had either a mental abnormality or personality disorder. RP (April 20, 2022) at 418-38. Instead, he believed Mr. Pasley's sex offenses where motivated by deeply conflicted feelings about his same-sex attraction, that he had engaged in "common types of cognitive

distortions" to justify offending against children, and that he had successfully confronted those distortions in treatment. RP (April 20, 2022) at 368-75.

Dr. Abbott disagreed with Dr. Fox's assertion that actuarial instruments always underestimate the risk of reoffense. RP (April 21, 2022) at 469-72. He explained that the Static-99R defines "reoffense" to include non-predatory offenses, and therefore sweeps more broadly than RCW 71.09.060. RP (April 21, 2022) at 470. He also rejected Dr. Fox's reliance on the rate of undetected sex offenses overall, explaining that the relevant data point was the number of undetected *reoffenses* by identified (usually supervised) offenders, which no study quantified. RP (April 21, 2022) at 470-71. Finally, Dr. Abbott cited multiple studies showing that the Static-99R significantly overestimated risk when used on offenders in California. RP (April 21, 2022) at 469.

Dr. Abbott also opined that the incident involving K.R. was unlike Mr. Pasley's offenses prior to treatment. RP (April 20,

2022) at 406. Specifically, he testified that Mr. Pasley regarded K.R. as a peer, with whom he did not seek contact to assert power or control or to escape feelings of shame about same-sex attraction. RP (April 20, 2022) at 407-10. Dr. Abbott acknowledged that the incident with K.R. reflected some cognitive distortions related to consent. RP (April 21, 2022) at 584. But he said this the incident was fundamentally different from the offenses involving minors, and he opined that treatment had given Mr. Pasley insight into the harm those offenses had caused. RP (April 20, 2022) at 371-72.

Dr. Abbott rejected the notion that K.R. had the mental capacity of a child. RP (April 20, 2022) at 405-06. He testified that K.R. was able to communicate clearly and understand complicated terms, and that he demonstrated life skills typical of a young adult. RP (April 20, 2022) at 405-06. Consistent with Det. Reynolds's testimony that he selected the youngest-looking picture of K.R. from the Facebook account, Dr. Abbott noted that the record contained some pictures in which K.R. looked younger

than his recorded age and some in which he looked over 18. RP (April 20, 2022) at 408.

Ultimately, Dr. Abbott assigned Mr. Pasley an absolute recidivism risk of 7.8 percent over five years, and he opined that Mr. Pasley was "unlikely to engage in predatory acts of sexual violence." RP (April 21, 2022) at 509-10, 514.

Defense motion to admit deposition testimony that K.R. gave verbal consent

Prior to trial, the defense sought to admit a portion of the deposition transcript wherein Mr. Pasley recounted a conversation he had with K.R. just before their second sexual encounter. RP (Mar. 18, 2022) at 9-12; Sub. No. 93 at 104. In this conversation, Mr. Pasley discovered that K.R. had a girlfriend, and he asked K.R. about the implications of this:

> Q. Okay. And then you - - you said what to him? I'm sorry.
>
> A. I said I asked him what was up, and at that point, that's when he told me, Oh, I was just talking to my girlfriend on the phone.
>
> Q. Okay. And then what happened?

> A. And so I was like - - and that's when I looked at him. I was like, You got a girlfriend? I was like, and he showed me his phone. She was on the phone, and he said - - his comment to me was - - I asked him. I said, So what's up between us? And he said, It's cool because she didn't live in Washington state. She - - his girlfriend actually lived in California.

Sub. No. 93 at 104.

The State sought to exclude this portion of the transcript, as well as the portion in which K.R. told Mr. Pasley he was almost 19 years old, on the ground that both were hearsay. RP (Mar. 18, 2022) at 10-12. The defense contended neither excerpt was offered for the truth of what K.R. asserted, but instead for the effect that each assertion had on Mr. Pasley. RP (Mar. 18, 2022) at 13.

The trial court admitted the first excerpt, wherein K.R. told Mr. Pasley his age, but excluded the second. RP (Mar. 18, 2022) at 13. It ruled:

> At this point the court finds that it is not relevant and therefore the court is not allowing that designation. I am unclear as to if it were not offered for the truth of the matter asserted how it would be relevant to a contested issue in this trial, and that is the court's

> ruling without further development of authorities and argument.

RP (Mar. 18, 2022) at 13-14.

Defense counsel then asked, "what I'm hearing from the court is if we develop that further at trial, then the court could rule on that as it's presented[?]," and the court confirmed, "All pretrial rulings are subject to being re-raised and brought up and addressed on the record." RP (Mar. 18, 2022) at 14. The court also clarified, however, that it would not be willing to "stop moving forward on a trial to address a technical need, to create a new CD or somehow address technical issues in order to present evidence or testimony." RP (Mar. 18, 2022) at 14.

Defense counsel did not re-raise the issue at trial, so the trial court admitted the State's preferred version of Mr. Pasley's deposition. RP (Mar. 20, 2022) at 336-37.

CR 41(b)(3) motion to dismiss

When the State rested, the defense moved to dismiss under CR 41(b)(3), arguing that the evidence was insufficient to sustain

a finding that Mr. Pasley had committed an ROA. RP (April 20, 2022) at 339-40. Counsel correctly noted that Mr. Pasley's deposition was the only substantive evidence regarding the encounter with K.R., and this deposition described mutually consensual contact. RP (April 20, 2022) at 340-43; RP (April 25, 2022) at 636-43.

The court denied the defense motion,[2] explaining only that "[t]he standard for this motion is not whether the State proved during its case-in-chief that the respondent committed a recent over act beyond a reasonable doubt . . . [and that] CR 41(b)(3) presents a very high burden." RP (April 25, 2022) at 654-56.

[2] The court initially denied the motion without prejudice and said it would hear the defense case and consider any briefing the parties wished to submit. RP (April 20, 2022) at 345-47; see CR 41(b)(3) (court may decline to render judgment on motion to dismiss for insufficient evidence until close of all evidence). After Ms. Jones testified, but before Dr. Abbott had completed his testimony, the court considered the motion to dismiss and denied it solely on the basis of the evidence submitted in the State's case-in-chief. RP (April 25, 2022) at 655-56. This evidence did not include Mr. Pasley's plea statement or judgment and sentence in the case involving K.R. RP (April 25, 2022) at 653-56.

Trial court's findings and conclusions

The trial court found the State had proved the RCW 71.090.060 criteria beyond a reasonable doubt. RP (April 26, 2022) at 763-64. It found that both experts testified credibly, both demonstrated some bias in their actuarial methodologies, and that Dr. Fox's testimony was most persuasive. RP (April 26, 2022) at 755-60. With respect to the ROA, the court found as follows:

> Mr. Pasley's explanation of this event, combined with his later conviction, including his statement that he made in the document called "Statement of Respondent on Plea of Guilty" and the testimony of Detective Reynolds shows beyond a reasonable doubt that the act of Mr. Pasley created a reasonable apprehension of harm of a sexually violent nature in the mind of an objective person who knows Mr. Pasley's history and mental condition.
>
> . . . Although [K.R.]'s chronological age was 18, and the court did not have evidence that his physical development was that of a pubescent male, given [Mr. Pasley's] prior offenses, the significant age difference, Mr. Pasley's knowledge of some impairment by [K.R.], although not specified, and the fact that the event was at Mr. Pasley's home in the living room, similar to the situation as [P.D.]'s experience, this act would create a reasonable apprehension of harm of a sexually violent nature.

RP (April 26, 2022) at 761-62.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE MR. PASLEY COMMITTED A RECENT OVERT ACT

Civil commitment is a "massive curtailment of liberty." In re Harris, 98 Wn.2d 276, 279, 654 P.2d 109 (1982) (quoting Humphrey v. Cady, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)). Laws abridging liberty interests violate due process unless they are narrowly tailored to further a compelling state interest. U.S. Const. amend. XIV; In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). Accordingly, when the State seeks to civilly commit a person, due process requires that it prove the person is both mentally ill and currently dangerous. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); Albrecht, 147 Wn.2d at 8.

To prove that a person is currently dangerous, the State is sometimes required to present evidence of an ROA. Young, 122

Wn.2d at 40-42. The SVP commitment statute defines an ROA as:

> any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.

RCW 71.09.020(13).

The State need not prove an additional ROA where, on the day the State files the petition, the respondent is incarcerated for an act that indisputably qualifies as an ROA. RCW 71.09.030, .060(1); Det. of Hendrickson, 140 Wn.2d 686, 695-96, 1 P.3d 473 (2000). But where, between his incarceration for a qualifying offense and the filing of the petition, the respondent has been released to the community, the State must prove an ROA. Albrecht, 147 Wn.2d at 8-11.

In Mr. Pasley's case, the State was required to prove an ROA because the crime for which he was incarcerated when the State filed its petition, third-degree assault – negligence, does not

indisputable qualify as an ROA. See RP (Feb. 25, 2022) at 26-27. Indeed, that offense is not sexual in nature and, to the extent the In re Barr plea implies evidence of a more serious offense, the State presented no evidence of the original charges or allegations. See id.; RP (April 26, 2022) at 752, 761.

The State's theory was that Mr. Pasley was aroused by the power he exerted over his victims, and that he therefore preferred victims who did not have the capacity for consent. RP (April 25, 2022) at 564, 689-91. The State conceded that K.R. had the capacity to consent, but it argued that he was nevertheless a "substitute victim" because he was "embarrassed by the sexual contact." RP (April 25, 2022) at 650, 670-72, 738.

Even if the State had presented substantive evidence to support this theory—which it did not—evidence of K.R.'s "embarrassment" would neither establish nor create any reasonable apprehension of sexually violent harm. See RCW 71.09.020(13). The evidence was therefore insufficient to prove an ROA.

To be sure, appellate courts have upheld ROA findings based on sexual activity with vulnerable adults as substitute victims. In re Detention of Anderson, 166 Wn.2d 543, 550, 211 P.3d 994 (2009) (sexual activity with vulnerable fellow patients); In re Detention of Froats, 134 Wn. App. 420, 438, 140 P.3d 622 (2006) (sexual harassment of developmentally disabled fellow inmate). But this has occurred only where the State has proved beyond a reasonable doubt that the sexual activity in question was non-consensual.

In Anderson, the sexual activity in question involved several of his copatients institutionalized at Western State Hospital. 166 Wn.2d at 545. To prove these sex acts were ROAs, the State presented testimony that "at least three of the patients . . . were incapable of consensual sex." Id. at 547. And the respondent himself admitted that he "took sexual advantage of at least two these patients; he described his relationships with them as "'deviant.'" Id.

Unlike the State in Anderson, the State in Mr. Pasley's case conceded that K.R. was capable of consenting to sexual contact. RP (April 25, 2022) at 650 ("we are not arguing that [K.R.] could not consent to sexual contact"). And unlike the respondent in Anderson, Mr. Pasley did not describe his encounter with K.R. as deviant or predatory. On the contrary, Mr. Pasley testified that he recognized K.R. as a fellow "fluid" man and engaged him in conversation to confirm this was true. Ex. 29 at 91, 94-95.

This was consistent with testimony from both Dr. Abbott and Ms. Jones, who opined that Mr. Pasley was still working to reduce some cognitive distortions but now fundamentally appreciated the importance of consent. RP (April 20, 2022) at 371-72, 407-10; RP (April 21, 2022) at 584, 624-25. Even if the third-degree assault plea suggested he misunderstood K.R.'s perspective on their encounter, this misunderstanding is nothing like the predatory acts at issue in Anderson. It is not enough to overcome

reasonable doubts that Mr. Pasley poses an ongoing threat of sexually violent harm. See RCW 71.09.020(13).

Mr. Pasley's case is similarly distinguishable from Froats. The respondent in Froats, who had a 30-year history of rape and molestation against young children, made sexual advances toward a fellow inmate who had "the developmental age of about five years." 134 Wn. App. at 423-27. There was no dispute about consent: the evidence showed the inmate responded to Mr. Froats's advances by assaulting him. Id. at 427. And Mr. Froats later described the incident as one in which "'[h]e was trying to love [the fellow inmate] in the way that God loved him,'" which an expert witness testified was common code for pedophilic predation. Id. (alteration in original).

Like Mr. Pasley, Mr. Froats argued that his alleged ROA was properly viewed as an attempt at a consenting adult same-sex encounter. Id. at 435. Unlike Mr. Pasley, Mr. Froats conceded (and other evidence also showed) that the encounter was not, in fact, reasonably viewed as consensual. Id. at 437.

Because the State provided no substantive evidence of a non-consensual sexual encounter with K.R., the evidence was insufficient to prove an ROA.

2. THE TRIAL COURT ERRED BY EXCLUDING THE PORTION OF MR. PASLEY'S TRANSCRIPT WHEREIN HE RECOUNTED K.R.'S STATEMENT THAT THEIR SEXUAL ENCOUNTER WAS "COOL," EVEN THOUGH K.R. HAD A GIRLFRIEND, AND DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO RE-RAISE THIS ISSUE BEFORE THE DEPOSITION WAS ADMITTED INTO EVIDENCE

While the trial court's evidentiary rulings are reviewed for abuse of discretion, "whether or not a statement was hearsay [is reviewed] de novo." State v. Heutink, 12 Wn. App. 2d 336, 356, 458 P.3d 796 (2020) (citing State v. Hudlow, 182 Wn. App. 266, 281, 331 P.3d 90 (2014)). "'Out-of-court statements offered to show their effect on the listener, regardless of their truth, are not hearsay.'" Id. at 356-57 (quoting Henderson v. Tyrrell, 80 Wn. App. 592, 620, 910 P.2d 522 (1996)).

In Mr. Pasley's case, the trial court correctly recognized that K.R.'s statement regarding his age was not offered for its

truth but to show the effect it had on Mr. Pasley. RP (Mar. 18, 2022) at 13. Specifically, the court ruled this statement was admissible because it informed Mr. Pasley's understanding of K.R.'s capacity to consent. RP (Mar. 18, 2022) at 13.

But the court appeared to misapprehend the significance of the other contested excerpt. This excerpt contained two questions and two answers: one question was, "You got a girlfriend?" and the other was, "So what's up between us?" Sub. No. 93 at 104. But when the court excluded the excerpt, it referred only to "this question and answer," and concluded K.R.'s answer would be irrelevant unless offered to prove its content. RP (Mar. 18, 2022) at 13-14.

In context, the court appears to have been focused on the question of whether K.R. had a girlfriend. See RP (Mar. 18, 2022) at 13 (defense counsel arguing, "we're not trying to prove whether he had a girlfriend . . . [i]t goes to the issue of consent and in Mr. Pasley's mind whether it was consensual or not"). In any event, K.R.'s statement that what was "up" between he and

Mr. Pasley was "cool," despite K.R.'s having a girlfriend, was directly relevant to Mr. Pasley's state of mind. The trial court's contrary ruling was error, and defense counsel was ineffective for failing to correct this error before the deposition was admitted.

Both the federal and Washington constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when (1) his or her attorney's conduct "falls below a minimum objective standard of reasonable attorney conduct and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993). Both standards are satisfied here.

For purposes of an ineffective assistance claim, defense counsel's conduct is unreasonable if it cannot be explained by

any legitimate tactic. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). No legitimate trial tactic explains counsel's failure to re-raise the issue of the disputed deposition excerpt.

As noted, the State's theory was that Mr. Pasley was aroused by the power he exerted over his victims, and that he therefore preferred victims who did not have the capacity for consent. RP (April 25, 2022) at 564, 689-91. The State conceded that K.R. had the capacity to consent, but it argued that he did not do so in fact, that this aroused Mr. Pasley, and that the sexual contact therefore qualified as an ROA. RP (April 25, 2022) at 650. The defense theory was that Mr. Pasley benefitted from treatment, as demonstrated by his post-treatment attempts to seek out only consenting adult partners, and that he had sought K.R.'s consent before initiating sexual contact. RP (April 25, 2022) at 702-03.

In the disputed deposition excerpt, Mr. Pasley recounted K.R.'s statement that what was "up" between he and Mr. Pasley was "cool." Sub. No. 93 at 104. K.R. made the statement in

response to Mr. Pasley's inquiry; thus, the excerpt showed an apparently successful attempt to clarify that K.R. was willingly participating in their sexual contact. As evidenced by counsel's initial attempt to admit the excerpt, it was valuable evidence. There was no strategic reason to keep it out; the first prong of the ineffective assistance analysis is met. Reichenbach, 153 Wn.2d at 130.

The second prong of the analysis is also satisfied, because there is a reasonable probability that, but for counsel's oversight, the outcome of the trial would have been different. Benn, 120 Wn.2d at 663.[3]

Both expert witnesses reviewed the police reports and court filings related to the incident with K.R., both listened to recorded

[3] A substantively identical prejudice standard applies to the trial court's initial error in excluding the disputed deposition excerpt. Non-constitutional evidentiary error requires reversal if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

interviews with K.R., and both interviewed Mr. Pasley about the incident. RP (April 18, 2022) at 106-11; RP (April 20, 2022) at 403-08. Both testified subject to the limiting instruction that the materials on which they relied were not admitted as substantive evidence. RP (April 18, 2022) at 94; RP (April 20, 2022) at 365. On the basis of the same materials (K.R.'s statement to police, the investigating officers' reports, and the prosecutor's statements at Mr. Pasley's subsequent plea hearing), the experts reached starkly different conclusions.

Dr. Abbott testified that K.R. was able to communicate clearly and understand complicated terms, and that he demonstrated life skills typical of a young adult. RP (April 20, 2022) at 405-06.

Dr. Abbott and Ms. Jones both gave testimony in support of the defense theory, explaining that Mr. Pasley was working to resolve conflicted feelings about his sexuality, control his impulsivity, and select appropriate adult partners. RP (April 20, 2022) at 371-77; RP (April 21, 2022) at 600-04. With respect to

the incident involving K.R., Dr. Abbott testified that, while Mr. Pasley acted "impulsive[ly]" by failing to seek a clearer expression of verbal consent, "[i]n his mind, he was engaging in a mutually consenting adult sexual relationship." RP (April 25, 2022) at 497-98, 503, 555, 569, 582, 585.

In its final ruling, the trial court explained that the incident involving K.R. qualified as an ROA because "Mr. Pasley's description of the incident . . . did not describe any attempt to get actual consent for the sexual interaction." RP (April 26, 2022) at 754. Had the trial court considered the excluded excerpt, it likely would not have reached this conclusion. Thus, had the disputed deposition excerpt been admitted, there is a substantial likelihood that the trial court would have reached a different conclusion regarding the ROA.

D. CONCLUSION

For the reasons given above, the trial court's order finding Mr. Pasley is an SVP subject to civil commitment must be reversed. The evidence was insufficient to sustain the necessary

predicate finding that Mr. Pasley committed an ROA and, even if the evidence were sufficient, that finding was fatally undermined by counsel's defective performance.

I certify that this document was prepared using word processing software and contains 6,988 words excluding the parts exempted by RAP 18.17.

DATED this 27th day of December, 2022.

Respectfully submitted,
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